

DEC 14 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
No. 77-680

WALL STREET TRANSCRIPT CORPORATION
and RICHARD A. HOLMAN,

Petitioners,

v.

WAINWRIGHT SECURITIES INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENT
WAINWRIGHT SECURITIES INC.
IN OPPOSITION**

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**BRIEF FOR RESPONDENT
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IN OPPOSITION**

Opinions Below

The opinion of the United States District Court for the Southern District of New York, granting respondent's motion for a preliminary injunction, is reported at 418 F.Supp. 620. The unanimous opinion of the United States Court of Appeals for the Second Circuit, affirming the judgment of the District Court, is reported at 558 F.2d 91. As the opinions of the District Court and of the Court of Appeals are not accurately reproduced in the Petition for Certiorari, respondent respectfully requests that reference be made to the official reporters cited above.

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1977. Petitioners' Petition for Rehearing was denied by the United States Court of Appeals for the Second Circuit on August 16, 1977.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

Question Presented

The Court of Appeals upheld a preliminary injunction issued to prevent repeated publication by petitioners of unauthorized abstracts of respondent's copyrighted Research Reports. The abstracts are based entirely upon and consist entirely of verbatim extracts from and paraphrases of such Reports and present the projections, analyses and conclusions of such Reports. The courts below held that the abstracts infringed respondent's copyrights because the abstracts did not constitute a fair use of the Reports. The preliminary injunction does not otherwise prevent petitioners from publishing material containing references to or descriptions of the contents of any of respondent's copyrighted Reports, including the ones found to have been infringed by petitioners. The question presented is:

Whether the First Amendment requires that the preliminary injunction be dissolved notwithstanding the findings below, unchallenged here, that petitioners' abstracts are not a fair use of respondent's copyrighted Research Reports.

Constitutional Provisions and Statute Involved

The pertinent provisions of the United States Constitution (the Copyright Clause, Article I, Section 8, Clause 8;

and the First Amendment) are set forth in the Petition at page 34a. Pertinent provisions of the Copyright Act currently in force (17 U.S.C. §§ 1 *et seq.* (1970 & Supp. V 1975)) and of the new Copyright Law, effective January 1, 1978 (17 U.S.C.A. §§ 101 *et seq.* (Supp. 1977 at 227)) are set forth in the Appendix hereto.

Statement

This action for copyright infringement and unfair competition was commenced by respondent Wainwright Securities Inc. ("Wainwright") after repeated publications by petitioners of unauthorized abstracts of Wainwright's copyrighted Research Reports and after its requests that petitioners cease to do so went unheeded.* The abstracts consist entirely of verbatim extracts from and paraphrases of the Wainwright Reports, which are the sole source for the abstracts. Jurisdiction was conferred upon the District Court by 28 U.S.C. § 1338 (1970).

Wainwright is a brokerage firm engaged in the securities industry specializing in institutional research. Approximately 90% of its revenues and an even greater percentage of its profits are derived from its institutional research operation which involves approximately 80 professionally trained persons. Wainwright supplies its more than 900 institutional clients with in-depth, analytical Research Reports relating to approximately 275 industrial, financial, utility and railroad corporations and the ap-

* Petitioners published abstracts of five copyrighted Wainwright Reports in *The Transcript* between May 10 and July 5, 1976. Wainwright protested the publication of the first three abstracts by letter dated and delivered on May 27, 1976. On May 31, 1976 petitioners published a fourth abstract. Counsel attempted to resolve the matter until petitioners published a fifth abstract on July 5, 1976. Wainwright commenced this action on July 9, 1976.

proximately 30 industries in which they are engaged. These corporations account for the bulk of the market value of a typical institutional equity portfolio as measured by capitalization. The Research Reports present the conclusions, analyses and projections of Wainwright's securities analysts, and are "an especially valued feature which distinguishes Wainwright's services from other brokers'." 418 F.Supp. at 627. Wainwright's Research Reports are duly copyrighted in accordance with the Copyright Act, 17 U.S.C. §§ 1 *et seq.* (1970 & Supp. V 1975). Contrary to petitioners' assertions (Petition, p. 4), Wainwright's Research Reports are not restricted to its clients, but are also sold for cash to non-clients and offered for sale by Find/SVP, an information clearinghouse.

Petitioner Wall Street Transcript Corporation publishes *The Wall Street Transcript* ("The Transcript"), which is a weekly publication. Petitioner Richard A. Holman controls the publishing company and is the Editor of *The Transcript*. One of *The Transcript's* features is the "Wall Street Roundup" which, as the District Court found, "consists largely, if not exclusively, of abstracts of reports prepared by institutional and business researchers." 418 F. Supp. at 622. *The Transcript* "advertises itself to the financial world as a purveyor of institutional research reports in abstract form." *Id.* A typical advertisement, which appeared in the July 5, 1976 issue of *Barron's* proclaims:

"... now you can read 1,000 pages of institutional research in 30 minutes! First thing each week, THE WALL STREET TRANSCRIPT brings you a fast-reading, pinpointed account of heavyweighted reports from the top institutional research firms.

"OUR WALL STREET ROUNDUP will save you hundreds of hours of reading; report to you the highlights of thousands of institutional-level research reports each

year; and index every bit of it for you, immediately and continuously, for use whenever you want it. In addition, every account will give you full details as to who wrote the report, the date and the original length. . . ." 418 F.Supp. at 622 (emphasis added).

The extent of taking by petitioners' abstracts from Wainwright's copyrighted Research Reports was illustrated by the Court of Appeals by the following comparison of statements contained in petitioners' abstracts on the left and corresponding statements from Wainwright's Reports on the right:

". . . 1976 prospects are strengthened by the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment."	"The first of the 'surprises' alluded to above that strengthens 1976 prospects is the magnitude of the increase in industrial and agricultural chemical earnings in last year's recessionary environment." (p.1)
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"And second, he says that likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year."	"The second development likely to aid comparisons this year was the surprisingly limited extent to which the Fiber Division's losses shrank last year . . ." (p.2)
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"His estimated earnings for 1976 is \$3.76 per share compared with earnings of \$3.24 per share in 1975."	"Earnings (Years ending Dec. 31) ... Actual 1975\$3.24 per share(b) Estimated 1976\$3.75 per share(c)
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"(b) including LIFO profit of 20 [cents] per share and 12 [cents] per share benefit of change in pension funding assumptions.

"... one of the most hopeful developments in recent years was the decision by management last year to attempt to negotiate sale of the Fiber Division."

"... the company could wind up with possibly \$100 million, plus a tax writeoff and a sizable one-time charge against earnings."

"... the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, the major incremental financial cost to FMC will lie in the determination of what share of the present unreserved overrun is the company's responsibility."

"... one of the most hopeful developments at FMC in recent years was the decision reached by management last year to attempt to negotiate sale of the Fiber Division" (p.4)

"... FMC would wind up with possibly \$100 million, plus a tax writeoff and a sizable one-time charge against earnings." (p.6)

"... the company is now far enough along on the learning curve that additional cost overruns, if any, will be small, and that the major incremental financial cost to FMC will lie in the determination of what share of the *present* unreserved overrun is the company's responsibility." (p.7)

(558 F.2d at 96)

The District Court found that:

"The takings have been substantial in quality, and absolutely, if not relatively substantial in quantity. Com-

pelled by their very *raison d'être* to present the *essence* of the Wainwright reports the Transcript abstracts suck the marrow from the bone of Wainwright's work without even the assertion of any independent research by the Transcript. There is, by the nature of an abstract, a special concentration on analyses, projections and conclusions: the elements of greatest value. Moreover, while the takings are not great in relation to the length of the reports they are nevertheless absolutely substantial in quantity." 418 F.Supp. at 625 (emphasis in the original).

The District Court rejected petitioners' assertion that their abstracts were protected by the First Amendment, held that petitioners' abstracts did not constitute a fair use of Wainwright's Reports, and found that they constituted derivative works under 17 U.S.C. § 7 (1970), published without the consent of Wainwright. *Id.*

The District Court concluded that "Wainwright has without question made a *prima facie* showing of infringement" (*id.* at 627) and that a preliminary injunction was necessary to

"shield [Wainwright] from the unmeasurable consequential damage to its brokerage business which could flow from making the contents of its research reports known without cost to competitors, potential clients and the public." *Id.*

On August 19, 1976 the District Court issued a preliminary injunction which was entered on August 20, 1976, and modified on October 12, 1976. The preliminary injunction prohibits petitioners, during the pendency of this action, from:

"(a) publishing, selling, marketing or otherwise disposing of any copies of the abstracts of plaintiff's copyrighted Research Reports set forth on pages 43,669, 43,689, 43,789, 43,845 and 44,163 of the May 10, May 17, May 24, May 31 and July 5, 1976 issues of *The Wall Street Transcript*, respectively; and

"(b) publishing, selling, marketing or otherwise disposing of any copies of any other abstracts of any of plaintiff's copyrighted Research Reports presented in the format of the feature 'Wall Street Roundup' of *The Wall Street Transcript*"

Although the District Court agreed to stay the preliminary injunction for five days to permit petitioners to apply to the Court of Appeals for a stay, no such application was made then, or at any time thereafter, nor did petitioners make any application to the Court of Appeals for a preference under § 27(e) of the Second Circuit Rules.

The Court of Appeals affirmed the decision of the District Court in all respects, observing, in its unanimous opinion dated June 15, 1977 that "the Transcript appropriated almost verbatim the most creative and original aspects of the [Wainwright] reports, the financial analyses and predictions, which represent a substantial investment of time, money and labor." 558 F.2d at 96. The Court of Appeals found that the petitioners'

"use of the Wainwright reports was blatantly self-serving, with the obvious intent, if not the effect, of fulfilling the demand for the original work This was not legitimate coverage of a news event, *instead it was, and there is no other way to describe it, chiseling for personal profit.*" 558 F.2d at 96-97 (emphasis added)

Five months after the Court of Appeals rendered its decision petitioners filed their Petition for Certiorari.*

ARGUMENT

This case falls well within the scope of the fair use doctrine under the Copyright Act. Petitioners' First Amendment argument to this Court was correctly rejected by both courts below. Similar arguments based upon the First Amendment have uniformly been rejected by other federal courts. See *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1169-71 (9th Cir. 1977); *United States v. Bodin*, 375 F.Supp. 1265, 1267 (W.D. Okla. 1974); *Robert Stigwood Group Ltd. v. O'Reilly*, 346 F.Supp. 376, 383 (D.Conn. 1972), *aff'd*, No. 72-1826 (2d Cir. May 30, 1973); *Walt Disney Productions v. Air Pirates*, 345 F.Supp. 108, 115 (N.D. Cal. 1972); *McGraw-Hill, Inc. v. Worth Publishers, Inc.*, 335 F.Supp. 415, 422 (S.D.N.Y. 1971).

The doctrine of fair use encompasses the First Amendment in the area of copyright protection. As the District Court observed:

"The tension between the First Amendment and the copyright statute which the Transcript professes to discern in such cases as this does not exist. It does not exist because the doctrine of fair use, discussed below, has been precisely contoured by the courts to

* Petitioners did not file their Petition for Certiorari until the end of the ninety day period following denial by the Court of Appeals of their petition for rehearing or rehearing *en banc*. On December 6, 1977, eight days before Wainwright's Brief in Opposition was due, petitioners filed with Justice Marshall an application for a stay of the preliminary injunction pending disposition of the Petition for Certiorari. Wainwright filed a memorandum in opposition to petitioners' application on December 12, 1977.

assure simultaneously the public's access to knowledge of general import and the right of an author to protection of his intellectual creation." 418 F.Supp. at 624

The Court of Appeals described the doctrine of fair use as creating

"a privilege 'in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner' *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), quoting Ball, *Copyright and Literary Property* 260 (1944). For example, a classic illustration of fair use is quoting from another's work in order to criticize it. The principle has most often been applied to works in the fields of science, law, medicine, history and biography. The fair use doctrine offers a means of balancing the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science and industry." (558 F.2d at 94)

Thus, a fair use analysis includes an evaluation of the public interest in dissemination of information, precisely the analysis engaged in by both courts that previously heard this case. Fair use involves the balancing of public and private interests. Copyright protection is granted in order to encourage authors to publish their works and make them generally available, thereby enriching society as a whole.

Petitioners' First Amendment argument fails to accommodate the important public interests which the Copyright Act serves. Unlike the privacy statutes, right of reply

statutes and right of publicity statutes which are the subject of cases on which petitioners rely, the Copyright Act is expressly authorized by Article I, Section 8 of the United States Constitution. As this Court recognized in *Mazer v. Stein*, 347 U.S. 201, 219 (1954):

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

The First Amendment was never intended by its framers to nullify the Copyright Clause. In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884), this Court stated:

"The construction placed upon the Constitution by the first [copyright] act of 1790, and the [copyright] act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, is almost conclusive."

Professor Nimmer, a leading authority on copyright, states:

"The fact that the first amendment was approved by the Congress in 1789 and became effective in 1791 lends added credence to the conclusion that copyright is not prohibited by the first amendment. If it were, Congress would hardly have enacted the first Copyright Act on May 31, 1790, nor the amendment thereto on April 29,

1802." 1 *Nimmer on Copyright* § 9.21 at 28.3-28.4 n. 135 (1976).

This Court has scrupulously distinguished the area of copyright protection from other interests. In *New York Times Co. v. United States*, 403 U.S. 713, 726n. (1971), Justice Brennan's concurring opinion observes that "copyright cases have no pertinence here" (403 U.S. at 726n.), clearly indicating that the result would be different if the Copyright Act applied. That the result would indeed have been different is apparent from Justice White's concurring opinion (in which Justice Stewart joined) and which is dispositive of petitioners' argument in support of their Petition for Certiorari:

"no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another." (403 U.S. at 731n. 1)

To abrogate copyright protection, as petitioners urge, would defeat the goal which the Copyright Clause and the First Amendment were both intended to serve, the dissemination of writings to the public.*

It is well established that the Copyright Act applies to newspapers. *New York Times Co. v. United States*, *id.* at 731n. 1; *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919). See also *Best Medium Publishing Co. v. National Insider, Inc.*, 259 F.Supp. 433 (N.D. Ill.), *aff'd*,

* In *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S.Ct. 2849 (1977), this Court rejected a First Amendment challenge to a state right of publicity law. The Court reasoned by analogy to the goals of patent and copyright law to provide "an economic incentive for [Zacchini] to make the investment required to produce a performance of interest to the public." *Id.* at 2857. The Court did not discuss the scope of the Copyright Act in *Zacchini*, nor did it consider the appropriateness of injunctive relief under the Copyright Act.

385 F.2d 384 (7th Cir. 1963), *cert. denied*, 390 U.S. 955 (1968); *Worthy v. Herter*, 270 F.2d 905, 908 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959) ("Freedom of the press bears restrictions. It does not include the right to publish what another has registered with the copyright office."); *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 F. 797 (7th Cir. 1921). As Justice White points out in his concurring opinion in *New York Times Co. v. United States*, *supra*, 403 U.S. at 731 n.1, "[n]ewspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events."

The Court of Appeals expressly noted (558 F.2d at 97) that the fair use doctrine has been codified as Section 107 of the new Copyright Law, Pub.Law No. 94-553, which becomes effective January 1, 1978, and that such section explicitly provides for the application of fair use to news reporting:

"Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, *news reporting*, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and

(4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C.A. § 107 (Supp. 1977 at 232) (emphasis added).

As the Committee Reports state, Section 107 was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1975); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976).*

It is no answer for petitioners to assert that their contention that the First Amendment protects copyright infringement by newspapers, is limited to "newsworthy statements".** As they well know, and correctly state in their petition, the government cannot tamper with the news or editorial content of the press, citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (Petition, pp. 16-17). If newspapers have the right to determine the subject matter of their news reports, and Wainwright does not contend otherwise, and if the Copyright Act, as petitioners con-

* The Court of Appeals described Judge Lasker's "well-reasoned fair use analysis" (558 F.2d 97) as follows:

"Judge Lasker found that the Transcript's abstracts did not constitute a fair use of the Wainwright reports because (1) the takings were 'substantial in quality, and absolutely, if not relatively substantial in quantity,' 418 F.Supp. at 625; (2) publication of the abstracts probably reduced the value of Wainwright's research reports; (3) the public interest in dissemination is not affected since the Transcript is not restrained from researching and preparing its own reports; and (4) such reports could be prepared from original materials. See *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269, 1274 (S.D.N.Y. 1970)." 558 F.2d at 94.

** The United States Court of Appeals for the Ninth Circuit recently expressed disapproval of carving out newsworthy statements from copyright protection. *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1171 n. 17 (9th Cir. 1977). Petitioners assert that Wainwright's Research Reports are "newsworthy in their entirety". (Petition, p. 21)

tend, cannot constitutionally protect any writing which is made the subject of a news report, then there simply could be no copyright protection.

Contrary to petitioners' assertions in their Petition for Certiorari, the preliminary injunction does not prevent petitioners from publishing material containing references to or descriptions of the contents of Wainwright's copyrighted Research Reports, including the ones found to have been infringed by petitioners. The preliminary injunction only enjoins petitioners from publishing any other *abstracts* of Wainwright's *copyrighted* Research Reports in the *format* of the feature "Wall Street Roundup". The preliminary injunction was narrowly directed toward a continuing course of repetitive conduct which clearly infringed upon Wainwright's copyrights. The preliminary injunction does not even prevent petitioners from publishing Wainwright's copyrighted Research Reports in their entirety. Of course, should petitioners do so, they would infringe Wainwright's copyrights, but they would not violate the preliminary injunction.*

The preliminary injunction was issued because the District Court found that

"There is every reason to believe that the publication of the extracts may materially reduce the demand for Wainwright's services. Furnishing its reports to its clients is an especially valued feature which distinguishes Wainwright's services from other brokers'.

* Contrary to the assertion at page 5 of the Petition, the preliminary injunction does not prevent petitioners from circulating copies of the issues of *The Transcript* in which the infringing abstracts were published. The injunction specifically provides for deletion of such abstracts should petitioners wish to circulate copies of such issues.

The Transcript's infringements impair the value of Wainwright's copyrighted material by making its contents available to other brokerage houses with which Wainwright competes. Moreover the infringements impair Wainwright's ability to publish its own abstracts or to authorize others to do so.

• • •

"... In the circumstances Wainwright is entitled to a preliminary injunction to protect its copyrighted property and to shield it from the unmeasurable consequential damage to its brokerage business which could flow from making the contents of its research reports known without cost to competitors, potential clients and the public." 418 F.Supp. at 627.

The Court of Appeals sustained these findings.

A more narrowly drawn preliminary injunction simply would not protect Wainwright. The injunction prevents petitioners from doing what they had done and assert the right to continue to do—print abstracts in the "Wall Street Roundup" format, comprising the "sum and substance" of Wainwright's copyrighted Reports without any independent research on their part and merely using verbatim extracts from and paraphrases of the Wainwright Reports.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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December 14, 1977

APPENDIX

1a

APPENDIX

Relevant Statutory Provisions

The Copyright Act, 17 U.S.C. §§1 *et seq.*
(1970 & Supp. V 1975)

§ 1. *Exclusive rights as to copyrighted works.*

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art. . . .

§ 7. *Copyright on compilations of works in public domain or of copyrighted works; subsisting copyrights not affected.*

Compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this title; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such

Relevant Statutory Provisions

use of the original works, or to secure or extend copyright in such original works.

§ 101. *Infringement.*

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) *Injunction.*

To an injunction restraining such infringement

§ 112. *Injunctions; service and enforcement.*

Any court mentioned in section 1338 of Title 28 or judge thereof shall have power, upon complaint filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by this title, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this title may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants.

Relevant Statutory Provisions

Copyright Law, effective January 1, 1978,
17 U.S.C.A. §§ 101 *et seq.* (Supp. 1977 at 227)

§ 101. *Definitions*

As used in this title, the following terms and their variant forms mean the following:

• • • •

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

• • • •

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

• • • •

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

• • • •

Relevant Statutory Provisions

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. . . .

§ 106. *Exclusive rights in copyrighted works*

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

§ 107. *Limitations on exclusive rights: Fair use*

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies

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for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

§ 502. *Remedies for infringement: Injunctions*

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk's office.